***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

# 75-1227

*To be argued by*
HOWARD S. SUSSMAN

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1227**

UNITED STATES OF AMERICA,
*Appellee,*

—v.—

SIR KUE CHIN,
*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE UNITED STATES OF AMERICA


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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 75-1227**

UNITED STATES OF AMERICA,

*Appellee,*

—v.—

SIR KUE CHIN,

*Defendant-Appellant.*

## BRIEF FOR THE UNITED STATES OF AMERICA

### Preliminary Statement

Sir Kue Chin, also known as "Chan Kau",* appeals from a judgment of conviction entered June 20, 1975, in the United States District Court for the Southern District of New York, after a trial before Honorable William C. Conner, United States District Judge, and a jury.

Indictment 75 Cr. 31, filed January 10, 1975, charged Chan in two counts with violation of the federal narcotics laws. Count One charged Chan with conspiring to violate those laws between November 1, 1973, and January 31, 1974, in violation of Title 21, United States Code, Section 846. Count Two charged him with distributing and possessing with intent to distribute 0.04 grams of

* The defendant was known as "Chan" to his customers in the heroin trade, and will be sometimes referred to hereafter by that name.

38.7% pure heroin on November 4, 1973, in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

Trial against Chan, the sole defendant, commenced May 5, 1975, and concluded May 8, 1975, when the jury returned a verdict of guilty on both counts (Tr. 1, 508).* On June 20, 1975, Judge Conner sentenced Chan to one year's imprisonment to be followed by three years' special parole on each of the two counts, the sentences to run concurrently (Tr. 536).

Chan is enlarged on bail pending this appeal.

## Statement of Facts

### The Government's Case

The proof at trial related to Chan's efforts during November and December 1973 to sell heroin in large quantities through one Soo Yuen ("Soo") who, unknown to Chan, was an informer for the Drug Enforcement Administration ("DEA").

On November 3, 1973, Soo met Chan in Chinatown, represented himself to be a narcotics dealer from Oregon, and asked Chan to obtain narcotics for him (Tr. 44-45, 49). Chan suggested a meeting for the following morning (Tr. 49).

At the meeting of November 4, Chan delivered to Soo a sample of 0.04 grams of 38.7% pure heroin (Tr. 49-51,

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* "Tr." refers to the trial transcript; "Br." to Brief for Appellant (as amended by letter dated August 8, 1975); and "A." to the Appendix to that Brief. Emphasis throughout this brief is added unless otherwise indicated.



110, 241) and stated he could obtain a pound and a half of heroin for $30,000 (Tr. 51). There was evidence that one Wong Lim ("Lim") was Chan's source for this pound and a half (Tr. 167-168). After leaving Chan, Soo turned the sample over to Agent John Toal of DEA ("Agent Toal") (Tr. 52-53, 236-237).

Some two weeks later, Soo again met Chan in Chinatown and offered to introduce him to Soo's "old time partner . . . from Oregon" who would like to "get some narcotics and bring it back to Oregon." Chan agreed (Tr. 58-59).

On November 21, 1973, at about two o'clock in the morning, Soo introduced Chan to Agent Stephen Tse of DEA ("Agent Tse") at Shavey Lee's restaurant in Chinatown (Tr. 58, 180). In the ensuing conversation Chan (who was, of course, unaware of Agent Tse's true identity) offered to sell Agent Tse heroin for $15,000 per pound, in minimum quantities of one-half pound. Agent Tse agreed to buy a half pound "'for a beginner'" and Chan replied that he would "'talk to my man first, talk to this other man first'" and "'let you know'" (Tr. 181). Agent Tse and Chan arranged to meet again the following night at the same time at Shavey Lee's (Tr. 182). No meeting took place on November 22, but Chan told Agent Tse over the telephone that day to get in touch with Soo for further information (Tr. 182-183).

Chan and Agent Tse met twice more before the negotiations between them broke off. On November 26, at Shavey Lee's, Agent Tse asked Chan "what the status was" but Chan "was very evasive at the time" (Tr. 184). The following day, November 27, Agent Tse met Chan outside of 68 Mott Street, Manhattan, and asked why Chan had not met him earlier that day at Shavey Lee's as promised. Chan replied that he had been there, and walked

past Agent Tse into 68 Mott Street (Tr. 184, 205, 210, 305). Shortly thereafter, Agent Tse returned to his regular post in Seattle (Tr. 184-185).

Chan again met Soo on December 20, 1973, and offered to sell him for $8,000 a half pound of heroin which Chan would obtain from one Mong Wong ("Mong") (Tr. 59-62). Various meetings that day among Chan, Soo and Mong were observed by DEA agents, and a partially audible tape recording of their negotiations was made by the use of a Kel recorder worn by Soo (Tr. 60, 63-72, 230-231, 243, 248-252), but no sale was consummated.

## The Defense Case

The defense case consisted of evidence of Soo's testimony at an unrelated trial in San Francisco in which he described some of his activities as a DEA informer (Tr. 366-368), and evidence that Agent Toal had arrested Chan, obtained his pedigree and taken him to court (Tr. 368-369).

## The Defense Motion and Its Resolution

After the defense case, Chan moved for dismissal of the conspiracy count, contending that the proof, if it showed any conspiracy at all, showed two conspiracies and not the single conspiracy alleged in the indictment because Lim and Mong, the suppliers, were never seen together (Tr. 341-342), and "obviously were not connected with each other" so that there was "no showing of a meeting of the minds" (Tr. 370-371). Judge Conner accepted this argument and obliged the government to choose which of the two conspiracies it would pursue (Tr. 375-376). Although continuing to maintain that it had charged and proved but one conspiracy (*see* Tr. 375-376, 380-381, 388), the government chose "the conspiracy in-

volving Wong Lim, that is the first conspiracy" (Tr. 377). As a result, Overt Act 5, the only one which alleged a meeting with Mong, was not read to the jury in the Court's charge.

## The Defense Request and the Court's Charge

Chan orally requested Judge Conner to charge the jury that it must acquit if it found that there was more than one conspiracy (Tr. 384). Finding that this is not "the classic Kotteakos-type situation because the defendant here is the hub of both conspiracies" and "the common element" (Tr. 385-386), Judge Conner declined so to charge. Instead, his charge and supplemental instructions repeatedly stressed that a single conspiracy was alleged and that conviction could only be had if the jury found a single conspiracy (*e.g.*, Tr. 449, 450, 452, 453, 456, 491-493, 502, 504-506), for example (Tr. 453):

> "If upon consideration of all the evidence, direct and circumstantial, you find beyond a reasonable doubt that the minds of the alleged conspirators met in *an understanding* and that they agreed to work together in furtherance of *an unlawful scheme, the particular unlawful scheme alleged in count one of the indictment*, then proof of the existence of the conspiracy is complete."

# ARGUMENT

## POINT I

### There was no prejudicial variance between the charge in the indictment and the proof at trial.

Appellant argues that the proof at trial necessarily established two conspiracies instead of the one charged in the indictment, and that the claimed variance resulted in specific items of material prejudice which require either dismissal of the whole indictment (Br., p. 11) or dismissal of the conspiracy count and retrial on the substantive count (Br., p. 19). We submit that the jury properly found one conspiracy on the evidence in this case. But even if two conspiracies had been proved, there was no prejudice and appellant's arguments are uniformly without merit.

### A. The Jury Properly Found The Single Conspiracy Charged.

The evidence showed that from the start of November until Lim's supply ran out, Chan negotiated with Lim for pound, and pound and a half, quantities of heroin at prices from $15,000 to $20,000 per pound (Tr. 51, 167-168, 180-181). In December, when Chan reported to Soo that Lim did not " 'have any dope *at this time*' " (Tr. 341), Chan turned to Mong and negotiated for half pound quantities at $8,000 each (Tr. 59-62).

Even considering this Court's decision in *United States* v. *Miley*, 513 F.2d 1191 (2d Cir. 1975), which was handed down months after the indictment in this case was filed, a jury is entitled to infer from drug dealings of this magnitude that each supplier must have known that he

was not the sole source of supply, even though he did not know the identity of any other supplier; "the scale of the operation permit[s] the inference that the persons at a particular level" in the conspiracy chain "must have known that others were performing similar roles" (*id.*, at 1207). *See United States* v. *Tramaglino*, 197 F.2d 928 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952). From this and related inferences the jury is permitted to find the existence of a single conspiracy, even in the absence of evidence specifically linking all of its parts.

In *Tramaglino*, which, significantly, appellant does not cite, Perez and others purchased marijuana from Rosario and, when his supply ran out, from Tramaglino. Rosario and Tramaglino had no dealings with one another, but made "several sales, at different periods . . . to the same group of buyers with knowledge on the part of the two suppliers that several conspirators were involved in the purchases and that the purchases were for resale. This was enough . . . to show that each appellant, as supplier, participated in, and acted to further the ends of, the conspiracy" (197 F.2d, at 930). In the present case, Lim and Mong must have known from its quantity that the heroin appellant sought was for resale, and it makes no difference that they dealt with him rather than with "several conspirators".

*Miley*, which also involved a core which obtained drugs from two different sources (513 F.2d, at 1206), came to the opposite result because "the value and quantity of drugs" the evidence "proved to have been sold were of nothing like the scale established in previous cases" and the operations concerning them "could scarcely be attributed to any real organization, even a 'loose-knit' one" (*id.*, at 1207). The nine defendants charged there dealt in LSD and PCP, for the most part in quantities not exceeding an ounce for $1,800 (*id.*, at 1196-1198), al-

though the last LSD deal was for 50,000 units for $16,500 (*id.*, at 1198-1199) and one defendant agreed to provide a pound of cocaine for $16,000 (*id.*, at 1198). Brandt and Miley provided "the only point of contact" which all the other defendants had in common (*id.*, at 1206, 1207), and neither of them exercised control over the activities of the others comparable in any way to the control exercised by core defendants in such cases as *United States* v. *Sisca*, 503 F.2d 1337 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974), and *United States* v. *Bynum*, 485 F.2d 490 (2d Cir. 1973).

While the present case obviously does not involve drug dealings of the scale of *Sisca*, *Bynum*, or the other cases mentioned in *Miley* (513 F.2d, at 1207), *Miley* does not preclude the inferences on which the jury here properly found the single conspiracy charged.* *Miley* and the present case are very different. *Miley* involved LSD and PCP, substances which can be manufactuerd domestically and need not be imported; the present case involves heroin of which a sample was 38.7% pure. *Miley* involved transactions for the most part under $2,000; the negotiations here contemplated transactions up to $30,000. *Miley* involved the activities of nine defendants; the present case involves the efforts of a single defendant to obtain heroin in quantities large enough to permit the inference that each of his suppliers must have known that he was not the sole source of supply.

These factors, we respectfully submit, suffice to distinguish *Miley* from the present case so that the essential premise of Chan's prejudicial variance argument—the existence of a variance—is destroyed.

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* On their facts, neither *Kotteakos* v. *United States*, 328 U.S. 750 (1946), nor *United States* v. *Russano*, 257 F.2d 712 (2d Cir. 1958), on both of which appellant relies (Br., p. 11), has anything to do with whether the present case involves a single conspiracy.

## B. If There Was a Variance It Was Not Prejudicial.

Even if the proof at trial established two conspiracies (which we do not concede), Chan was not prejudiced by the variance. His arguments (Br., pp. 11-14) are without merit and, there being no prejudice, the assumed variance does not result in reversal. *United States* v. *Miley*, *supra*, 513 F.2d, at 1207-1208); *United States* v. *Agueci*, 310 F.2d 810, 827 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963).

### 1. The Proof of the Mong Meetings Was Properly Before the Jury.

Chan argues that the evidence of his activities with Mong prejudiced him because their proof was "unnecessary to show intent, identity, or any other element" of the so-called Lim conspiracy (Br., p. 11). This is frivolous. At trial, Chan claimed, among other things, that he had no intent to deal in heroin because the word "heroin" was not itself used in the conversations with Soo and Agent Tse (Tr. 156-157, 199-202, 416-418). His similar acts with Mong are, under well-established law, admissible to counter that claim. *E.g.*, *United States* v. *Torres*, Docket No. 74-2303, Slip op. 4573, at 4580 (2d Cir. July 2, 1975); *United States* v. *Keilly*, 445 F.2d 1285, 1288 (2d Cir.), *cert. denied*, 406 U.S. 962 (1971); *United States* v. *Marchisio*, 344 F.2d 653, 667 n.11 (2d Cir. 1965).*

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* Chan did not request an instruction limiting the jury's consideration of the Mong evidence to the issue of intent, or object to its omission (*cf.* Tr. 391). "No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict . . . ." Federal Rules of Criminal Procedure, Rule 30. Chan having failed to request the limiting instruction, Judge Conner's failure to give it was the better course. *Cf. Becher* v. *United States*, 5 F.2d 45, 49 (2d Cir. 1924); *United States* v. *Garguilo*, 310 F.2d 249, 252 (2d Cir. 1962).

None of the various cases appellant cites (Br., p. 12) is to the contrary. This case obviously does not involve conduct too remote in time, *see United States* v. *Feldman*, 136 F.2d 394, 399 (2d Cir. 1943), *affirmed*, 322 U.S. 487 (1944), nor evidence which permeated the whole trial and was pertinent only to stricken parts of the indictment as in *United States* v. *Wolfson*, 437 F.2d 862 (2d Cir. 1970).

## 2. Chan's Cross-Examination of Government Witnesses Was Not Influenced by the Mong Evidence.

Chan also argues (Br., pp. 12-13) that his counsel's cross-examination of government witnesses was adversely affected by the claimed variance. The argument is at least twice bad.

First, it is factually unsound. The jury well knew about Mong without the cross-examination (Tr. 62-66, 68-70), and cross-examination was thus unnecessary to establish an adequate factual basis for the instruction on multiple conspiracies to which Chan claims he was entitled. Moreover, Chan was aware of the government's case well in advance of trial, and thus could not have been surprised by the Mong evidence (Tr. 386-389; Br., pp. 13-14).

Second, it is legally unsound. Chan was not entitled to an instruction that the jury would have to acquit him if two conspiracies were found. A trial court "is not required to charge on the issue of multiple conspiracies in every case where such a request is made." *United States* v. *Calabro*, 449 F.2d 885, 893 (2d Cir. 1971); *see United States* v. *Tramunti*, 513 F.2d 1087, 1108 (2d Cir. 1975).

In *United States* v. *Aiken*, 373 F.2d 294 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967), which appellant does not cite, this Court said (373 F.2d, at 299):

> "Appellants next claim as error the trial court's failure expressly to charge the jury that multiple conspiracies were not within the ambit of the indictment. The court in its charge twice stressed, however, that the government alleged a single conspiracy, and added that it must show that each defendant was 'a knowing part of it.' Thus the jury could not have thought that it might convict if it found multiple conspiracies."

In *United States* v. *Sisca*, *supra*, 503 F.2d, at 1345, *United States* v. *Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974), and *United States* v. *Cohen*, Docket No. 74-2026, Slip op. 4405, at 4420 (2d Cir. June 26, 1975), this Court has upheld charges similar to that sought by appellant. In *Sisca* and *Sperling*, however, it characterized that charge as "if anything, more favorable to appellants than that to which they were entitled" (*ibid.*); in *Cohen* it upheld the charge against the contention that it was impermissibly "' all or nothing'." In *United States* v. *Tramunti*, *supra*, 513 F.2d, at 1107, this Court upheld as "clear, correct and within the decided cases" a charge similar to, although more detailed than, the charge given here.

No case we have found has explicitly considered whether the charge appellant seeks is required to be given when, as here, the evidence establishes a factual predicate for it, and it is requested by a defendant who is the core of every conspiracy which the jury might find and thus cannot be prejudiced even if there is a variance between the single conspiracy charged and the multiple conspiracies proved, *see Berger* v. *United States*, 295 U.S. 78 (1935); *Jolley* v. *United States*, 232 F.2d 83, 88 (5th Cir. 1956). Because a variance does not lead to reversal in the absence of prejudice (*supra*, p. 9), we respectfully

submit that it is reasonable not to require the charge when requested by a defendant who cannot be prejudiced if the jury erroneously finds a single conspiracy when multiple conspiracies were proved. *Cf. United States* v. *Sperling*, *supra*, 506 F.2d, at 1341,where in considering a charge somewhat more favorable to appellants than the one involved here this Court said:

> "Assuming arguendo that the evidence did show more than one conspiracy, there was no prejudice to appellants sufficient to warrant reversal under the rule stated in United States v. Agueci, *supra*, 310 F.2d at 827. See United States v. Calabro, *supra*, 467 F.2d at 983." *

Even if the charge were required to be given in such circumstances, the failure to give it here, we respectfully submit, would be harmless error.

In any event, if reversal were required, there would be no call to dismiss any part of the indictment. *United States* v. *Russano*, 257 F.2d 712, 716 (2d Cir. 1958). And no ground is even argued, and none appears, for reversal of appellant's conviction on the substantive count.

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* Emphasis in original.

## POINT II

### There was no impermissible amendment of the indictment.

The Court did not read Overt Act 5 in the indictment as returned by the grand jury, either in its charge (Tr. 458) or in answer to notes from the jury (Tr. 492-493). Chan argues from this that "the judge permitted the Government to go to the jury on a theory of guilt substantially different from that presented to the grand jury", that this amounted to an amendment of the indictment, and that reversal is required because, he claims, the grand jury might not have indicted him if the evidence before it had been the same as the evidence before the trial jury (Br., p. 15). The argument is utterly without merit. The case was presented to the grand jury and to the trial jury on the same theory and substantially the same evidentiary ground. The court's failure to read Overt Act 5 to the trial jury did not remove from their consideration the existence or significance of the December 20 meeting alleged in it.

The case was presented to the grand jury on the theory that appellant was engaged in a single conspiracy to sell heroin. Contrary to appellant's assertion, the grand jury was not led to believe that "appellant had a single supplier who furnished the drug sample to the Government informer and who was later to supply a larger quantity of drugs for sale" (Br., p. 14). The grand jury was given evidence from which it could easily infer that appellant had more than one source; it returned on that evidence an indictment which charges a single conspiracy. Thus, the grand jury was told about meetings between Soo and appellant on five different days, including December 20 when the meetings with Mong occurred (A., part D, pp. 3-5 of 12-16-74 and pp. 3-6 of 1/9/75), and no particular

source was identified although it was of course made clear that the heroin appellant "was proposing to sell was coming from another person other than himself" (*id.*, p. 6 of 12-16-74). The grand jury was also told that at the November 4 meeting appellant told Soo that he could sell Soo "approximately a pound and a half of heroine [*sic*] for $30,000" (*id.*, p. 4 of 12-16-74), that on December 12 "there was heroin available at $16,000 per pound" (*id.*, pp. 4-5 of 1/9/75), and that on December 20 appellant met Soo to "discuss the possible purchase of a half pound of heroine [*sic*] for approximately $8,000" (*id.*, p. 5 of 12-16-74). The November 4 and December 20 meetings were argued to the trial jury in the government's summation (Tr. 393, 398-399, 402-405, 407-408), also on the theory that there was a single conspiracy in which appellant was engaged.

It can be of no consequence that the Court did not read Overt Act 5. Obviously the jury was aware of Mong and the December 20 meetings, as appellant concedes (Br., p. 12 n.*; *see* Tr. 473, 506, 507). Although Judge Conner may have contemplated submitting the case to the jury on the theory that the conspiracy alleged was one between appellant and Lim, that is not in fact what he did. The single conspiracy which he charged the jury it must find to convict (*supra*, p. 5) was one "between the defendant and another person" whom he did not specify (Tr. 450) although he later gave Lim as an example (Tr. 456). In conformity with the defense request (Tr. 391), Judge Conner did not charge that Mong was not a conspirator, and the jury, which "could not have thought that it might convict if it found multiple conspiracies," (*United States* v. *Aiken*, *supra*, p. 11), convicted appellant of the single conspiracy charged, fully aware of Mong's existence and role as a possible supplier.

This could be error only if it were error *per se* to omit in reading an indictment to the jury any overt act as to which there was evidence presented at trial. No case which appellant cites, or which we have found, supports such a rule.

*Ex parte Bain*, 121 U.S. 1 (1887), as interpreted in this Court, does not. *United States* v. *Cirami*, 510 F.2d 69, 72-73 (2d Cir. 1975), and *United States* v. *Colasurdo*, 453 F.2d 585, 590-591 (2d Cir. 1971), *cert. denied*, 406 U.S. 917 (1972), establish that surplusage of the sort involved here may be deleted without error, and it needs no citation of authority to show that overt acts as to which no proof was offered at trial are regularly deleted before the case is given to the jury. This is not a case like *United States* v. *Wolfson*, 437 F.2d 862, 872-874 (2d Cir. 1970), where the deleted stock fraud charge was central to the case and the retention of evidence concerning it could not help but prejudice the defendants.

## POINT III

### Appellant's double jeopardy argument is without merit.

Appellant's final argument (Br., pp. 17-18) is that he is deprived of the protection of the Fifth Amendment's double jeopardy prohibition because "there is no way of knowing the basis of the crime the jury convicted appellant of having committed" (Br., p. 18). The argument is without merit, as *United States* v. *Mallah*, 503 F.2d 971, 984-985 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 25, 1975), establishes, whether or not the proof below showed a single conspiracy.

## CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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) ss.:
COUNTY OF NEW YORK)

HOWARD S. SUSSMAN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of September, 1975, he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Howard S. Sussman

Sworn to before me this
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